In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1459

GEORGE Y. STRIBLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted in the United States District Court for the Western District of Washington on three counts of wilfully attempting to evade payment of his personal income tax for the years 1959, 1960, and 1961, in violation of Section 7201 of the Internal Revenue Code.[1] He filed a pre-trial motion to suppress evidence which the district court granted. The government appealed under 18 U.S.C. 3731 and a divided court of appeals reversed that portion of the suppression order challenged by the government.

The facts are essentially as set forth in the majority opinion below (Pet. App. A 13–17).[2]

[1] The indictment was later transferred to the Northern District of Ohio, where the proceedings below occurred.

[2] Petitioner's "Statement of the Case" quotes a substantial portion of Judge Celebrezze's dissent below (Pet. App. A 28–

421-903—71

As a result of an Internal Revenue Service investigation of tax returns filed by a jockey who rode for petitioner, petitioner's own tax returns came under investigation for possible criminal violations; he was not advised of this fact. Several months after being interviewed by the Service about his jockey's affairs,[3] however, petitioner consulted an attorney about his income tax returns. The attorney, on learning that petitioner's tax returns omitted substantial amounts of taxable income, advised him to file amended returns and net worth statements and to cooperate fully with the Internal Revenue Service. Petitioner followed this advice and his amended returns were assigned to Revenue Agent Kast for audit.

Agent Kast, who had no knowledge of the criminal investigation being conducted by Special Agents of the Internal Revenue Service, advised petitioner and his attorney that his investigation was for the purpose of determining the correctness of the amended returns. He did not advise them that his inquiry might result in a criminal prosecution, nor did he at any time inform petitioner of his constitutional rights. During these interviews, petitioner and his attorney

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29). While we have no quarrel with the purely factual statements therein, we do take issue with the legal conclusions, which were rejected by the majority of the court below.

[3] An Internal Revenue summons was issued to petitioner requesting his appearance to give information relating to his jockey's tax liability, and petitioner at that time met with Special Agent Hunter. The district court ordered suppression of the Hunter interview in these proceedings and the government has not challenged that portion of the suppression order.

voluntarily turned over to Agent Kast incriminating documents and made incriminating oral statements. Petitioner was represented by counsel at all the conferences except one, which was an afternoon continuation of a morning session; it is not claimed that any incriminating statements were made during that afternoon.

The district court, in that portion of its suppression order here under review, suppressed all evidence turned over to Agent Kast by petitioner and his attorney on the ground that they had been misled by Agent Kast's statements that his investigation was for the purpose of determining the correctness of the amended returns (Pet. App. C 42–43). The court of appeals (Pet. App. A), Judge Celebrezze dissenting, reversed, holding that (Pet. App. A 20):

> Kast did not misrepresent anything to Stribling, his lawyer or his accountant, and did nothing to mislead them. During the interviews conducted by Agent Kast, the latter could not very well advise Stribling, his attorney and accountant, that the Intelligence Division was conducting an investigation, because Kast had no knowledge of that fact. Kast made them no promises. There was nothing coercive in anything which Kast did or said. The entire investigation was conducted without rancor or threats, but rather, in a friendly atmosphere, in the presence of Stribling's lawyer and accountant. Agent Kast cannot be blamed for the decision which Stribling, his lawyer and accountant voluntarily made in July, 1963, to make a clean breast of everything, to file

> amended returns and a net worth statement, and to co-operate with the Government in determining the correctness of the amended returns, obviously in the hope that no criminal prosecution would result. Kast was not assigned to investigate the amended returns until October 23, 1963, and had never heard of the case until after the amended returns were filed.
>
> It is not claimed that anyone connected with the Government had anything to do with the decision made by Stribling and his representatives to file amended returns and to make a clean breast of everything.
>
> Nor can the Government be blamed if Stribling neglected to tell his lawyer and his accountant about the Hunter interview. * * *

1. Petitioner argues here (Pet. 7–9) essentially that, even though Kast was not guilty of deceit since he did not know of the concurrent criminal tax investigation of petitioner by the special agents, the Internal Revenue Service, as an entity, was guilty of deceit because petitioner was not advised that he might be criminally prosecuted. There is, however, no legal duty imposed on the Service to apprise petitioner of such a possibility. All that is necessary is that the taxpayer be advised that the examining agents are concerned with the accuracy of his returns. Inherent in that advice is the warning that the agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion. *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Greene* v. *United States,* 296 F. 2d 841, 842–843 (C.A. 2);

United States v. *Frank*, 245 F. 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *United States* v. *Prudden*, 424 F. 2d 1021, 1031–1035 (C.A. 5), certorari denied, 400 U.S. 831; *Zacher* v. *United States*, 227 F. 2d 219, 225–226 (C.A. 8), certiorari denied, 350 U.S. 933.[4]

2. Nor is there any merit to petitioner's contention that Agent Kast should have advised him of his constitutional rights under this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436. It is well settled everywhere except in the Seventh Circuit[5] that there

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[4] Petitioner also urges (Pet. 10) that the holding below conflicts with *Reisman* v. *Caplin*, 375 U.S. 440, 449, "insofar as it upholds the legality of the Internal Revenue Service using the power of civil summons under 26 U.S.C. § 7602 in a criminal tax investigation * * * ." This question does not arise here since neither the government nor the court below has challeged the propriety of the first branch of the suppression order, relating to the summons issued by Special Agent Hunter and the resultant interview. Moreover, any ambiguity in the language of *Reisman* which might arguably result in a conflict was fully resolved in *Donaldson* v. *United States*, 91 S. Ct. 534, 544–545, in which this Court held that under Section 7602 "an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution," even though that prosecution may eventually follow. In the case at bar the summons was issued long before any recommendation for criminal prosecution.

[5] Petitioner claims a conflict (Pet. 10) with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). There is no conflict between that case and the one at bar because *Dickerson* lays down a rule for the conduct of special agents. Kast was a revenue agent. Moreover, *Dickerson* has prospective application only. That fact, plus the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent (News re-

is no need to give the *Miranda* warnings unless the potential defendant is in custody or otherwise substantially deprived of his freedom of action. *Morgan* v. *United States,* 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White,* 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz,* 433 F. 2d 415, 417–420 (C.A. 3); *United States* v. *Mancuso,* 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States,* 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani,* 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States,* 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States,* 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States,* 406 F. 2d 481, 484 (C.A. 10). Plainly, that was not the case here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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lease dated 11/26/68, 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476) should insure that there will be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit.

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